BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RENA PATTERSON	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 187,200 & 187,201
IBP, INC.	)	
Respondent	)	
Self-Insured	)	
	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant appealed the Award dated March 16,1998, entered by Administrative Law Judge Jon L. Frobish. The Director appointed Stacy Parkinson to serve as Appeals Board member Pro Tem in place of Gary M. Korte, who recused himself from this proceeding.

APPEARANCES

Michael G. Patton of Emporia, Kansas, appeared for the claimant. Gregory D. Worth of Lenexa, Kansas, appeared for the respondent. Derek R. Chappell of Ottawa, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

After finding that claimant did not provide respondent an opportunity to accommodate her medical restrictions, the Judge found that claimant's permanent partial general disability benefits should be limited to her 7.5 percent functional impairment. The Judge also found the date of accident to be claimant's last day of work for respondent on

May 18, 1995, the average weekly wage to be $368.78, and that the Workers Compensation Fund had no liability.

Both claimant and respondent contend the Judge erred. Claimant contends she has a work disability of 58 percent. Respondent contends claimant sustained several accidents and should receive separate awards for each. Additionally, respondent contends the Fund should be found liable for the left upper extremity injury and any injuries to the shoulders. Also, respondent contends the average weekly wage should be $313.71 for a June 14, 1993, accident and $316.51 for a February 4, 1994, accident.

The issues now before the Appeals Board are:

(1) What is the appropriate date of accident?

(2) What is the average weekly wage?

(3) What is the nature and extent of claimant's injury and disability?

(4) What is the liability of the Workers Compensation Fund?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

(1) On February 22, 1993, Rena Patterson returned to work for IBP, Inc., in Emporia, Kansas, as a meat trimmer. She had previously worked for IBP in 1990 and 1991.

(2) In either late May or early June 1993, Ms. Patterson began to experience symptoms in her right upper extremity. On June 14, 1993, she reported those symptoms to IBP which then initially modified Ms. Patterson's work by reducing the number of pieces of meat that she had to trim. Next, after Ms. Patterson saw the company doctor, IBP moved her to a job picking meat and bones from a conveyor belt, a job that she performed with her left hand.

(3) On July 1, 1993, after working two to three weeks on the picking job, Ms. Patterson returned to her regular trimming job at one quarter count. On July 7, 1993, she bid and obtained a job trimming short ribs, a job that she felt was easier to perform than her regular trimming duties. On July 21, 1993, after another doctor's visit, Ms. Patterson returned to the picking job.

(4) Sometime between July 21 and August 6, 1993, Ms. Patterson's left hand began hurting. Despite ongoing visits to IBP's medical dispensary and ongoing treatment with a physician, Ms. Patterson's symptoms in both upper extremities continued. On

September 7, 1993, Ms. Patterson returned to her regular trimming job where she experienced progressively worsening bilateral upper extremity symptoms.

(5) On February 4, 1994, Ms. Patterson returned to Dr. Montgomery, the physician who began treating her in July 1993, for right shoulder complaints. Four days later on February 8, 1994, Ms. Patterson returned to the doctor with additional complaints. The doctor diagnosed shoulder impingement.

(6) In March 1994, Dr. Montgomery operated on Ms. Patterson's right hand and wrist to treat her carpal tunnel syndrome. After being off work ten days, Ms. Patterson returned to IBP performing the light duty picking job. In September 1994, Dr. Montgomery released Ms. Patterson to return to regular work. She then worked as a short rib trimmer. But when that job caused her symptoms to increase, she returned to Dr. Montgomery in October 1994 and was restricted from lifting overhead with the right arm. She returned to the doctor in early December 1994 and received a right shoulder injection. In January 1995, she returned to the doctor with complaints of bilateral wrist pain and right shoulder pain. In March 1995, she received another right shoulder injection.

(7) In April 1995, Dr. Montgomery issued his permanent medical restrictions: no knives, no hooks, no tight gripping, and keep the right arm near the side.

(8) Upon learning that Ms. Patterson had permanent medical restrictions, IBP gave her 30 days to find, bid, and win a regular job from the jobs listed on the bid board. Although she placed bids on one or two jobs, she did not obtain them because of seniority. When she failed to secure a job by bid by May 18, 1995, IBP placed Ms. Patterson on medical leave of absence.

(9) If an individual does not bid and obtain a job within the one year period that they are on medical leave, they are terminated. After having been placed on medical leave, Ms. Patterson did not return to work for IBP.

(10) One or two weeks after being placed on medical leave, Ms. Patterson moved to Weleetka, Oklahoma, where her husband and six children had moved several months earlier. Weleetka has a population of 500 and is four hours from Emporia. Shortly after her move, Ms. Patterson and her husband separated, leaving her without transportation for several months.

(11) In April 1996, Ms. Patterson returned to Kansas for a medical evaluation at IBP's request by John M. Quinn, M.D., an Overland Park plastic surgeon. While at that appointment, Ms. Patterson told Joe Landholm, IBP's medical case manager, that she did not want to return to Emporia at that time because she was separated from her husband and she could not take her children out of school.

(12) After her medical leave commenced, Ms. Patterson did not bid on any of the available jobs. During her leave, she checked the bid board on two occasions but she did not see any jobs that she believed fell within her permanent medical restrictions.

(13) In May 1996, Ms. Patterson obtained employment in Oklahoma as a nurse's aid earning $4.75 per hour working 36 to 38 hours per week. She left that job after three weeks and obtained a job as a convenience store cashier earning the same rate of pay working 36 to 40 hours per week. After four months at that job, she obtained employment as a teacher and library aid at her children's school earning $600 per month.

(14) Considering the fact that Ms. Patterson was left without a job in May 1995, her move to Oklahoma was reasonable and not an attempt to manipulate her workers compensation claim. Considering the fact that Ms. Patterson was without transportation for a considerable period and without visible means of support, the Appeals Board finds that she put forth a good faith effort to find appropriate employment after being given her permanent work restrictions in April 1995. The jobs that Ms. Patterson found on the bid board before she moved to Oklahoma were either beyond her physical abilities or unobtainable due to her lack of seniority. At no time did IBP offer Ms. Patterson an accommodated job.

(15) Before moving to Oklahoma, Ms. Patterson was evaluated at her attorney's request by Lawrence, Kansas, physician Peter V. Bieri, M.D. Dr. Bieri has a fellowship in the use of the AMA Guides to the Evaluation of Permanent Impairment and regularly performs independent medical evaluations at the request of the Division of Workers Compensation. He saw Ms. Patterson in May 1995 and diagnosed carpal tunnel syndrome and entrapment neuropathy in both upper extremities and impingement in both shoulders, which comprised a 14 percent whole body functional impairment according to the AMA Guides, Third Edition (Revised). Because of her work-related injuries, he felt Ms. Patterson should be restricted to light physical labor. After reviewing the work tasks that Ms. Patterson performed in the 15-year period before she left IBP in May 1995, he believed that she could no longer perform 5 of 16, or 31 percent, of those work tasks.

(16) The Appeals Board is mindful that Dr. Quinn rated Ms. Patterson as having a 6 percent whole body functional impairment and that he believes that she could do all of her former work tasks. But the Appeals Board finds Dr. Bieri's opinions regarding functional impairment and task loss more credible.

(17) Ms. Patterson's average weekly wage was $316.51, which is comprised of $301.60 in regular wages ($7.54 per hour x 40 hours), $5.16 in average overtime, $3.53 in average bonus, and $6.22 in other pay, all as indicated in the wage information exhibits provided at the regular hearing. The evidence does not establish that Ms. Patterson regularly worked or was expected to work 6 days per week. She testified that she was sometimes given another day off during the week as a substitute for working on Saturday.

(18) The difference in Ms. Patterson's pre- and post-injury average weekly wage is 56 percent. That percentage is derived by comparing Ms. Patterson's current $600 per month salary, which equals to $138.46 per week, to the $316.51 she was earning while working for IBP.

CONCLUSIONS OF LAW

(1) The Appeals Board finds that Ms. Patterson's occupational injuries should be treated as one period of repetitive injury ending on her last day of work on May 18, 1995. That date of accident is appropriate for the following reasons:

(1) Ms. Patterson's symptoms and injuries gradually, progressively worsened through her last day of work.

(2) Ms. Patterson lost her job with IBP because of her work-related injuries when she was placed on medical leave after being unable to procure a regular bid job. In Berry[1], the Court of Appeals held that the last day of work is the appropriate date of accident for a repetitive use injury when the employee stops working as a direct result of the injury.

(3) Although her symptoms manifested themselves at different times, she sustained simultaneous injury to both upper extremities as a result of her work. In Depew[2], the Kansas Supreme Court found the employee had sustained one simultaneous injury to both upper extremities although the symptoms in the left upper extremity did not manifest themselves until the employee returned to work after recuperating from surgery on the right arm.

(2) Because hers is an "unscheduled" injury, the formula for permanent partial general disability benefits is defined by K.S.A. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed at any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less

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[1] Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[2] Depew v. NCR Engineering & Manufacturing., 263 Kan 15, 947 P.2d 1 (1997).

> than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute, however, must be read in light of Foulk[3] and Copeland[4]. In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wage when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(3) As indicated in the findings above, when all the circumstances are considered, Ms. Patterson made a good faith effort to find appropriate employment. Therefore, the actual difference in pre- and post-injury wages of 56 percent should be used for the permanent partial general disability formula.

(4) Averaging the 31 percent task loss with the 56 percent wage difference yields a 44 percent permanent partial general disability.

(5) Because the appropriate accident date for the period of repetitive trauma in issue is the last day of work in May 1995, the Workers Compensation Fund has no liability. By the very language of the Act, the Fund can only be held responsible for accidental injuries that occur before July 1, 1994.[5]

AWARD

WHEREFORE, the Appeals Board modifies the Award to decrease the average weekly wage to $316.51 and increase the permanent partial general disability to 44%.

Rena Patterson is granted compensation from IBP, Inc., a qualified self-insured, for a May 18, 1995, accident and a 44% permanent partial general disability. Based upon a $316.51 average weekly wage, Ms. Patterson is entitled to receive .86 weeks temporary total disability benefits at $211.02 per week, or $181.48, followed by 182.60 weeks of permanent partial general disability benefits at $211.02 per week, or $38,532.25, making

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[3] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306,944 P.2d 179 (1997).

[5] K.S.A. 44-567.

a total award of $38,713.73, which is ordered paid in one lump sum less any amounts previously paid.

Claimant is awarded the authorized medical expense incurred to date. Future medical benefits may be awarded upon proper application and approval by the Director.

The Appeals Board hereby adopts the remaining orders as set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 1998.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Michael G. Patton, Emporia, KS
Gregory D. Worth, Lenexa, KS
Derek R. Chappell, Ottawa, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director